No. 76-1649

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In the Supreme Court of the United States

OCTOBER TERM, 1977

MOVERS AND WAREHOUSEMEN'S ASSOCIATION OF METROPOLITAN WASHINGTON, D.C., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 550 F. 2d 962. The decision and order of the National Labor Relations Board (Pet. App. 10a-19a, 25a-55a) are reported at 224 NLRB 356.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1977. The petition for a writ of certiorari was filed on May 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's conclusion that the employers failed to dissipate the effects of an unlawful lockout before attempting to continue the lockout for a lawful reason.

STATEMENT

1. Petitioner Movers Association represents its constituent members in collective bargaining negotiations with Local Union No. 639, International Brotherhood of Teamsters ("the Union"). The constituent employers have bargained with the Union for more than 20 years (Pet. App. 11a).

In March 1975 the Association and the Union commenced negotiations to replace their existing bargaining agreement, which was due to expire at the end of that month. The Union submitted a proposed contract at the first meeting, and one of its representatives informed the Association's negotiators that the procedure used in ratifying the previous agreement would not be used again (Pet. App. 11a, 32a).[1] Four bargaining sessions were held; at the meeting on March 25 the Association made a "final" offer. The Union agreed to submit this offer to the membership, but without a recommendation for its acceptance (*id.* at 11a). On March 27 the Association

[1]The Teamsters International Constitution requires that collective bargaining agreements be ratified by the affected members (Pet. App. 29a-30a). The Union was dissatisfied with the procedure used in the previous negotiations because it involved a "barn vote" (a separate vote at each employer's premises) rather than a single vote at the Union hall, and because the contract offer would be accepted unless two-thirds of the members objected (Pet. App. 30a). The Union interpreted the Teamsters Constitution as requiring only a simple majority for ratification or rejection, except when a strike was the only alternative to rejection (Pet. App. 37a).

submitted its written proposal and requested ratification through a mail ballot referendum, in which the contract offer could be rejected "only by a two-thirds (2/3) vote of the members involved in the negotiations and voting or responding to the referendum mail ballot" (*id.* at 36a). The Union rejected this request (*id.* at 12a, 37a).

On March 31 the Association delivered to the Union a letter stating that unless the Union accepted the Association's ratification proposal that same day, "the Association's membership will be forced to terminate operations by bargaining unit personnel on Tuesday, April 1, 1975" (Pet. App. 38a). That day the Union told the Association that the ratification demand was improper and the threatened lockout would be an unfair labor practice; the Union also sent a telegram to the Association's attorney stating that "if the Moving and Storage Association locks out its employees it is in violation of their agreement and the contract will not be settled until each employee is paid for all lost earnings" (*id.* at 12a).

All bargaining unit employees were locked out on April 1. That same day, in response to the telegram to its attorney, the Association delivered a letter to the Union asserting that it was not in violation of its collective-bargaining agreement or the National Labor Relations Act and that "none of the employees involved * * * are [*sic*] entitled to backpay" (*id.* at 12a, 38a).

The Association delivered a letter to the Union on April 2 retreating from its position. This letter stated in part (Pet. App. 12a-13a, 39a):

> In response to your telephone call of yesterday, it is important to reiterate the reason why the employers found it necessary to terminate their operations on

> April 1, 1975. It appears that you feel that the employers temporarily terminated their operations because Local 639 would not agree to a secret ballot, FMCS supervised, referendum as ratification procedure for the final employer offer. It is the employers' position that you are free to use whatever means you deem appropriate to ratify the employers' final offer. This is a matter solely up to the Union in handling internal affairs.

The letter concluded that the lockout "continues only because there is no labor contract. We remain available to meet with representatives of the Local in order to resolve this matter" (Pet. App. 13a, 40a).

On April 2 the Union membership voted to reject the Association's contract proposal; bargaining negotiations were renewed. The Association rejected the Union's request that the lockout be terminated while negotiations continued. The lockout finally ended on April 28, when a new agreement was ratified (Pet. App. 13a, 40a).

2. The Board, upholding the administrative law judge, found that petitioners violated Sections 8(a)(1), (3) and (5) of the Act, 29 U.S.C. 158(a)(1), (3) and (5), by locking out their employees in part because the Union refused to accede to the Association's ratification proposal, which was not a mandatory subject of bargaining (Pet. App. 13a-14a, 45a-47a). By a divided vote the Board further found that the lockout retained its initial taint of illegality despite the Association's letter of April 2, and thus the locked-out employees were entitled to backpay for the full duration of the lockout (Pet. App. 17a-18a).[2]

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[2]The administrative law judge would have ordered backpay only until April 2, when the Association asserted that it was not seeking Union acquiescence in its proposed ratification procedure (Pet. App. 48a-51a).

The Board found that the Association had "failed to dissipate the effects of its unlawful lockout and to restore its employees to the *status quo ante*" (Pet. App. 16a) before attempting to continue the lockout for a lawful economic reason. The Board stated (*ibid.*):

> [The Association] failed to offer reinstatement to the locked-out employees until April 28, never offered backpay for the first 2 days of the lockout, and never acknowledged its own wrongdoing to the employees with regard to the lockout. To the contrary, by the letter of April 1 * * *, [the Association] stated its position that the lockout violated neither the parties' collective bargaining agreement nor the Act and that the locked-out employees were not entitled to backpay. In addition to [the Association]'s failure to affirmatively remedy the illegal lockout, record evidence shows that the injection into bargaining of the lockout issues may well have had some effect on negotiating a new contract. [The Association] acknowledged in the April 1 letter that the Union had taken the position that a lockout would violate the collective-bargaining agreement and that a new contract would not be negotiated until the locked-out employees were paid their lost earnings. The Union negotiators called a union membership meeting at the advent of the unlawful lockout to discuss, *inter alia*, the charge [with the Board] the Union was filing. Finally, the union president, in the March 31 telegram quoted above, demanded at the lockout's outset that [the Association] end the lockout and reinstate the employees in order for the negotiations to continue.

The Board concluded (Pet. App. 16a-17a):

> In these circumstances, without a cessation of the lockout and a restoration of the *status quo ante*,

it is difficult to conclude that any bargaining which ensued was not adversely affected, since the Union was required to negotiate with [the Association] and to ratify the contract from a weakened position induced by the unlawful lockout and the injection of the lockout-related issues into the bargaining process. * * * Similarly, to presume that, if [the Association] had offered reinstatement to the unlawfully locked-out employees on April 2, the lockout would have immediately been resumed on April 3 is speculative. Considering the parties' long history of peaceful labor relations, the smooth negotiations through March 25, the 2 months remaining until the busy season, and the Union's recognition that [the Association] could, after a hiatus, lawfully lockout for economic reasons, it is not unlikely that collectively [*sic*] bargaining free of the unfair labor practice could have resulted in an earlier contract. * * *

3. The court of appeals upheld the Board's decision and enforced its order in full. It first rejected petitioners' argument that the lockout was lawful from its inception (Pet. App. 2a-7a). It then concluded that the Board properly concluded that, in the circumstances of this case, the April 2 letter was insufficient to dissipate the initial illegality (*id.* at 8a):

> We think it dispositive of the issue that the employers here failed to dissipate the effects of their unlawful lockout. There was no offer of reinstatement to the employees until the lockout ended on April 28. The employers never acknowledged their wrongdoing with regard to the lockout and never offered backpay—not even for the first two days of the lockout. Indeed, the employers have always asserted, even on appeal, that the lockout was lawful from the beginning and that the employees were not entitled to backpay. If the employers had offered reinstatement to the unlawfully locked out employees on April 2, it does not necessarily follow that the lockout would have been immediately resumed on April 3. * * *

ARGUMENT

Petitioners do not dispute the Board's finding, upheld by the court of appeals, that the lockout was unlawful at its inception on April 1. They argue only that the taint of the unlawful lockout was dissipated by the Association's letter of April 2. Their contention turns on an evaluation of the particular facts of this case, and review by this Court is unnecessary. See *United States* v. *Johnston*, 268 U.S. 220, 227; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Contrary to petitioners' contention (Pet. 9, emphasis in original), the Board did not apply a "*conclusive presumption* that an unfair labor practice, existing only at the beginning of a lockout, has a continuing impact on bargaining throughout the lockout's duration, regardless of intervening circumstances." Rather, the Board found, and the court of appeals agreed, that the "intervening circumstances" were not sufficient to dissipate the effects of the particular unlawful lockout at issue here. Petitioners did nothing beyond sending a letter on April 2 to break the link between the unlawful inception of the lockout and its continuation. "The employers never acknowledged their wrongdoing with regard to the lockout and never offered backpay—not even for the first two days of the lockout. Indeed, the employers have always asserted, even on appeal, that the lockout was lawful from the beginning and that the employees were not entitled to backpay" (Pet. App. 8a). The Board found that the failure to take these steps had an effect on the subsequent bargaining negotiations.

thereby prolonging the dispute.[3] The Board reasonably concluded that, had petitioners offered reinstatement and backpay for the unlawful lockout,[4] it was not unlikely that the parties would have resumed negotiations with a view toward an early agreement, thereby obviating the need for a resumption of the lockout on April 3. Petitioners argue for an inflexible rule that employers may convert an unlawful lockout to a lawful lockout by doing nothing more than delivering a letter abandoning their unlawful objective. The Board properly concluded, however, that something more—such as a prompt offer to reinstate with backpay—was necessary in the circumstances of this case.[5]

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[3]Although the Board enunciated the general principle that "a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole" (Pet. App. 14a), it did not rest on that principle alone. It proceeded to show that it had validity when applied to the facts of this case.

[4]The normal remedy for an unlawful lockout is reinstatement with backpay. See, *e.g.*, *Bagel Bakers Council of Greater New York*, 174 NLRB 622, 633-634, enforced, 434 F. 2d 884 (C.A. 2), certiorari denied, 402 U.S. 908; *Southern Berverage Co., Inc.*, 171 NLRB 926, 941-942, enforced, 423 F. 2d 720 (C.A. 5).

[5]Petitioners' assertion (Pet. 18-19) that the Board has not required unions to dissipate the coercive effects of unlawful economic coercion before changing to a lawful objective is incorrect. The cases upon which petitioners rely do not stand for that proposition. In *Building and Construction Trades Council of Philadelphia*, 222 NLRB 1276, 1280-1281, the Board found the union's resumed picketing to be lawful where the union not only disclaimed its prior unlawful objective but also ceased all picketing for three weeks. And in *Local 344, Retail Clerks International Association*, 136 NLRB 1270, 1272-1273, all recognitional picketing had ceased five months prior to the effective date of Section 8(b)(7), which banned such activity. And see *Millmen-Cabinet Makers, Industrial Carpenters Union Local 550*, 227 NLRB No. 36, slip op. 5, petition for review pending, C.A. 9, No. 76-2132 (coercive effect of unlawful picketing not dissipated by change in picket signs where there was no hiatus in the picketing).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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